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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

M.M.,

Petitioner,

v.

THE SUPERIOR COURT OF STANISLAUS
COUNTY,

Respondent;

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Real Party in Interest.

F072693

(Super. Ct. No. 517203)

OPINION

THE COURT*

ORIGINAL PROCEEDING; petition for extraordinary writ review. Ann Q.
Ameral, Judge.

Robert D. Chase, under appointment by the Court of Appeal, for Petitioner.

No appearance for Respondent.

John P. Doering, County Counsel, and Robin L. Gozzo, Deputy County Counsel,
for Real Party in Interest.

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* Before Poochigian, Acting P.J., Peña, J. and Smith, J.

In January 2015, then two-month-old Noah was removed from the custody of his teenage parents, M.M. (mother) and M.F. (father), by the Stanislaus County Community Services Agency (agency) after he sustained multiple fractures while in their care. The juvenile court adjudged Noah a dependent child under Welfare and Institutions Code section 300, subdivision (e)¹ (severe physical abuse) and, at a contested dispositional hearing, denied both parents reunification services under section 361.5, subdivision (b)(5). In the writ proceedings before us, mother contends there is insufficient evidence to support a finding under section 361.5, subdivision (b)(5) that she knew or reasonably should have known that Noah was being physically abused. We concur and grant the petition.²

PROCEDURAL AND FACTUAL SUMMARY

Noah was born in November 2014, when mother and father were 17 and 19 years old, respectively. They were unemployed and lived in Modesto with mother's aunt, Cecelia, in a converted garage. Cecelia is a nurse who was then working a night shift. Cecelia has two sons, ages thirteen and four, who also lived in the home. Mother and father were Noah's primary caregivers.

On January 30, 2015, mother took then two-month-old Noah to the emergency room at Lucile Packard Children's Hospital in Stanford ("Children's Hospital") to be evaluated for a diaper rash and fussiness. Mother stated Noah had the rash for four days. She also noticed that morning that he was not moving his left leg as much as usual. Noah underwent a skeletal survey that revealed a spiral fracture of his left femur and a possible skull fracture. The attending physician suspected nonaccidental trauma, admitted Noah to the hospital, and contacted the agency. There was also concern that Noah had not had

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Father did not file a writ petition.

his followup immunizations and had missed his followup appointments. A left parietal skull fracture was confirmed on subsequent radiographs.

Mother denied any trauma or accident that could have caused Noah's fractured femur. She said she breastfed Noah and was the only one who cared for him unless she was in the shower or going to the bathroom. During those times, father took care of Noah. She could not explain how Noah sustained the fractured femur.

On the night of Noah's admission to Children's Hospital, an officer from the Palo Alto Police Department interviewed mother and her mother, Erika. Mother told the officer she had no idea how Noah broke his leg. She said Erika was changing Noah's diaper that morning and noticed his legs were not moving normally. Erika shared her concern about Noah's legs with mother. Mother said this was the first time she noticed there was something wrong with Noah's left leg. Mother further stated that father left to visit his father on Monday, January 26, 2015.

Erika told an officer that she went to mother's house at approximately 7:30 p.m. on January 29, 2015. They planned to go to Palo Alto the next day. When she arrived at mother's house, she heard Noah crying. Noah kept crying so she asked mother what was wrong with him. Mother said she thought he cried a lot because he had a rash. The next morning while changing Noah's diaper, Erika noticed Noah was not moving his left leg and brought it to mother's attention. Mother stated, "Don't scare me mom. I hope nothing is wrong with his leg." Erika said they drove to the Bay Area and Noah cried every time they moved his car seat. Once they arrived in the Bay Area, they checked Noah's leg again and agreed that there was something definitely wrong and took him to Children's Hospital.

Erika said she did not suspect that father broke Noah's leg. She said mother only left Noah long enough to take a shower. When she took showers, father took care of Noah. Erika said if mother knew what happened to Noah she would tell her because they were very close. Erika did not believe Cecelia's sons would intentionally harm Noah.

Cecilia said mother and father got along fine. She never saw them fighting or being abusive toward each other. She said they were loving parents and she had not seen any abuse toward the baby. On Wednesday, she noticed something “odd” about Noah’s leg. She mentioned it to mother and told her it could be a rash but she did not see one. She also said she worked nights and went to school so her interaction with the couple was limited.

When presented with evidence of Noah’s skull fracture, mother said she had a hard labor, which may have caused the fracture. She also said that during Noah’s one-month well-baby check, the doctor was concerned about Noah’s soft spot. The doctor said Noah may have popped a vein from crying and that may have caused bleeding. The social worker consulted with a pediatric resident who said that Noah would not have sustained a skull fracture during labor nor would he acquire a skull fracture from crying. In addition, it would have taken a significant force to cause Noah’s femur fracture since a baby’s bones are flexible.

Father was also asked about Noah’s injuries and denied seeing anyone injure Noah. He denied engaging in domestic violence and substance abuse other than trying marijuana in high school.

On February 1, 2015, Noah was discharged from Children’s Hospital in stable condition to the care of a foster parent.

On February 17, 2015, Dr. Rachel Gilgoff, a child abuse pediatrician, met with mother and father to discuss Noah’s condition. Prior to their meeting, Dr. Gilgoff reviewed Noah’s medical records from Children’s Hospital, his birth summary, and office visits at Kaiser Hospital. Dr. Gilgoff noted that Noah was born at 40 weeks gestation by vaginal delivery. He had normal examinations on November 10 and 24, 2014, and was evaluated for congestion on November 13, 2014. On January 5, 2015, Noah was evaluated for a lump on his head and a hematoma. The examining physician

noted that Noah had a soft hematoma on the left parietal area with slight bruising above the ear lobe.

Dr. Gilgoff asked mother and father about the lump on Noah's head discovered on January 5, 2015. Mother said she started noticing the lump when Noah was about three weeks old. One night, when he was approximately one month old, father noticed a soft spot on Noah's head. Father and mother said Noah "was really crying that day." "He started crying and that is when we noticed the soft spot." Mother called her aunt who recommended they take Noah to the doctor. According to mother, the doctor reassured them and told them that the soft spot was possibly from birth and that crying might put pressure on the veins on the side of his head and cause bruising. Mother and father denied that Noah sustained any trauma at any time.

Mother and father explained to Dr. Gilgoff that on January 26, 2015, Noah had a bad diaper rash and started to cry when his diaper was changed. Otherwise, he was fine and smiling. Mother stated, "He was acting so normal to me." Mother and father believed it was the diaper rash that was making Noah cry. On Friday, January 30, 2015, Erika noticed that Noah was not moving his left leg as much so they took him to Stanford because it was close to the maternal grandfather's home.

During the February 17, 2015 followup, Noah had a repeat skeletal survey that confirmed the left femur and left parietal skull fractures. Noah's laboratory tests for bone evaluation were within a normal range except for vitamin D, which was below the normal range. Dr. Gilgoff noted that Noah's injuries, without a known accidental traumatic event to account for them, were extremely concerning for child physical abuse. According to Dr. Gilgoff, mother and father did not appear to be overly concerned and did not express any emotion when she provided them that information.

Dr. Gilgoff reported that medical evaluation was ongoing to rule out underlying bone pathology. She subsequently received molecular test results ruling out osteogenesis imperfecta.

In February 2015, mother began attending parenting classes and was assigned to a therapist. In March 2015, mother reported that she and father were no longer together as he was dating someone else. At that time, the agency was evaluating Cecelia for placement.

On March 16, 2015, mother and father were interviewed by Detective Robert Rodenburg with the Modesto Police Department. Mother told Rodenburg she left Noah with father on either January 26 or 27, 2015, at approximately 8:15 p.m., for about an hour and a half. When she left, Noah was fine. While she was out, father called and told her Noah was hungry and very “fussy.” Father seemed frustrated and asked her to come home. When mother arrived home, she observed that Noah was very tired and his eyes were red and watery and he appeared to have been crying. She fed Noah and he fell asleep. When he awoke she changed his diaper and he cried. She assumed however that it was because of the rash. As soon as she released his feet, he stopped crying. Father left the following day to help his father and to look for employment in the Bay Area. She did not think father would hurt Noah but she could not think of any other time when it could have happened. She believed Noah was injured while being watched on either January 26 or 27, 2015.

Father told Detective Rodenburg he did not believe mother hurt Noah and denied hurting Noah himself. Asked why he left the day after he watched Noah, he said he gave it no thought and went to help his father move.

Mother and father both agreed to participate in a voice stress analyzer interview and Detective Rodenburg made the arrangements for them. On the morning of mother’s interview, she left a voice message for Rodenburg stating that she had spoken to her attorney and wanted to talk to him before the interview. Detective Rodenburg attempted to call mother but she did not answer her phone or show up for the interview. Father did not keep his appointment either or answer Rodenburg’s phone call.

On April 15, 2015, Dr. Gilgoff reported her findings to the agency. She opined that Noah sustained significant trauma on two separate occasions resulting in a femur fracture and skull fracture. As to the femur fracture, Dr. Gilgoff reported that Noah had no callus or healing indicating that the femur fracture occurred anywhere from that same day (January 30, 2015) or within seven to ten days. Dr. Gilgoff reported that significant force caused both of Noah's fractures. Dr. Gilgoff reported that Noah's femur fracture is a spiral or oblique fracture, which indicates a twisting force component to the injury. Further, these injuries are not injuries that Noah could have caused himself. Dr. Gilgoff reported that babies' bones are flexible and "bendy" indicating that significant force would have had to be applied in order for Noah to sustain a femur fracture. Dr. Gilgoff said that the individual who caused Noah's fractures knew exactly how the fracture occurred and when. Noah would have been distressed, very fussy and irritable and would cry but eventually his crying could have subsided. Noah may have cried at diaper changes if his leg was moved.

Dr. Gilgoff further reported that Noah's vitamin D level was low. However, it did not affect his bones and would not account for the fractures. The results of metabolic and phosphorus testing were normal. Noah was tested for brittle bone syndrome because a biological great aunt was noted to have bruising and broken bones throughout her life. This information was a red flag for testing but the tests were negative. Dr. Gilgoff reported that clinically Noah did not appear to suffer from a bone disease and no further testing was required.

As for the skull fracture, Dr. Gilgoff stated that it was a significant injury as the skull fracture covered the entire left side of Noah's skull and crossed over to the right side of his head. Dr. Gilgoff was not able to date the skull fracture, however, she noted that Noah had swelling and bruising on the left ear at the time of his January 5, 2015 visit. She said she got "super concerned" any time a child under the age of six months sustained head trauma, including a single bruise on the head. She noted that Noah had

two such injuries; the one on January 5, 2015, signified by swelling and bruising and again on January 30, 2015, when his skull fracture was first noted. She said if she had examined Noah on January 5, 2015, she would have ordered radiology studies and blood work to rule out a blood disorder or leukemia particularly if the parents were unable to explain the bruising. She said there was no indication at that time that Noah had a bleeding disorder. She said the bruising on January 5, 2015, may or may not have been the result of a skull fracture but from a prior traumatic injury. Upon receiving the skull fracture, Noah would have cried and the person who caused it would have known he was injured. Mother and father had proposed that the skull fracture may have been caused by childbirth and that Noah was born with head swelling. However, she said she reviewed his birth records and there was nothing abnormal (other than that Noah was large) noted at birth to indicate that he could have sustained a skull fracture at birth. Dr. Gilgoff stated that there could be some minor swelling to the head after delivery, depending on the delivery process, however, the swelling goes away within a few weeks of birth. She said the skull fracture was the direct result of a significant trauma to the head.

Dr. Gilgoff opined that Noah's injuries were clearly caused from significant traumatic events, and with no history of trauma, she was extremely concerned that the injuries were the result of nonaccidental and serious physical abuse. Further, she was concerned that whoever injured Noah would continue to inflict serious trauma to him that could result in injury or even death. She said the perpetrator knew exactly what happened and was not saying anything. Dr. Gilgoff expressed concern that if Noah was left alone with the perpetrator they would kill him if they continued to have contact with him.

In May 2015, the parties entered into a stipulated agreement by which mother and father waived their right to challenge jurisdictional findings proposed by the agency and to forgo reunification services with the understanding that the juvenile court would conduct a section 366.26 hearing and place Noah in a legal guardianship with Cecelia.

Cecelia agreed that she would keep mother and father away from her home and understood that if she allowed them in her home Noah would be removed from her care.

On May 13, 2015, mother and father appeared with their attorneys and indicated a settlement had been reached. Mother submitted a written waiver of rights form submitting the matter on the petition and reports. She and father also signed a form consenting to Cecilia's appointment as Noah's guardian ("Guardianship (Juvenile)-Consent And Waiver Of Rights") (JV-419).

The juvenile court adjudged Noah a dependent child under section 300, subdivisions (a), (b), and (e) after finding that Noah sustained two nonaccidental injuries, a left femur fracture and a left parietal skull fracture; that the fractures were the result of two separate injuries; that Noah was only cared for by mother and father; that as a result of the injuries, Noah suffered serious physical harm that put him at a significant risk of suffering further injury; that mother and father failed to protect Noah and that Noah is a child under the age of five years who suffered severe physical abuse which was nonaccidental.

The juvenile court denied mother and father reunification services under section 361.5, subdivision (b)(14) (waiver of reunification services) and scheduled a section 366.26 hearing for August 2015.

The next day, the placement specialist made an unannounced visit to Cecilia's home and discovered that Cecilia had left Noah in mother's care while she ran an errand. Noah was removed from Cecilia's care and placed in foster care. As there were no relatives available to take custody of Noah and the agency was unable to proceed with the legal guardianship, the agency filed a motion asking the court to withdraw mother and father's JV-419 waivers and to conduct a dispositional hearing.³

³ The JV-419 provides that if the guardian is not appointed or the guardianship is terminated, the waiver and consent is withdrawn and the parent's right to a trial on the issue of reunification services is reinstated.

On May 21, 2015, the juvenile court ordered mother and father's consent to the guardianship withdrawn, set aside the dispositional orders and set a contested dispositional hearing.

In its report for the dispositional hearing, the agency recommended the juvenile court deny mother and father reunification services under section 361.5, subdivision (b)(5) and (6) and set a section 366.26 hearing. According to mother's and father's therapists, mother still had no idea how Noah was hurt and father took no responsibility for Noah's injuries. Father was angry that mother saw Noah without permission and requested anger management. The department also reported that there was another relative interested in adopting Noah if mother and father did not reunify with him.

Mother's attorney attempted to establish at the contested dispositional hearing that Noah's fractured femur was caused by rickets and that his skull fracture occurred during delivery. He first called Dr. Gilgoff who testified that Noah's vitamin D level was deficient and that prolonged vitamin D deficiency can lead to rickets. Dr. Gilgoff explained that a child in a state of rickets has an increased risk for fractures. However, Dr. Gilgoff testified that Noah did not have rickets. She based her opinion on his other metabolic indices for bones such as calcium, phosphorus, and alkaline phosphate, which were normal. She also saw no indication that Noah's skull fracture occurred during the delivery process. She testified that his was a "generally uncomplicated delivery." In her opinion, Noah's femur and skull fractures were caused by nonaccidental trauma to a reasonable degree of medical certainty.

Dr. Steven Gabaeff testified for mother as an expert in clinical forensics. He testified that vitamin D deficiency is by definition infantile rickets and disagreed that the other metabolic indices for bones would be indicative for the presence of rickets. He also testified that Noah's skeletal survey showed signs of rickets in his left and right legs and in his chest. He said that given Noah's vitamin D deficiency and ricketic state, an injury as light as lifting him up by the legs to change his diaper made him vulnerable to an

accidental injury. He said mother's statement that Noah cried when she lifted his leg to change his diaper but was quiet when his leg was undisturbed was completely consistent with the pain associated with manipulating the fracture site. Dr. Gabaeff said he was absolutely certain that rickets played a significant part in Noah's femur fracture because of the weakness to the bones and the way the fracture appeared.

Dr. Gabaeff also believed rickets was a factor in Noah's skull fracture. He explained that Noah was born occiput posterior, part of his head was pointing toward the floor. The bones of the skull under extreme pressure and the position of Noah's head increased the amount of force on the skull during contractions.

Dr. Gabaeff also testified he was "virtually certain" that Noah suffered a skull fracture during the birthing process. This was based in part on the increase in Noah's head circumference from the 22d percentile at birth to the 94th percentile four days later. He said it was the largest increase in head circumference he had ever seen and consistent with subdural hemorrhage and skull fracture. He disagreed that Noah's delivery was uncomplicated. Rather, he said Noah showed signs of distress at birth. He also disagreed with the endocrinologist's conclusion that Noah did not have osteogenesis imperfecta.

Dr. Ronald Cohen, Chief of Radiology for Oakland Children's Hospital, was called by the agency as a witness and qualified as an expert in pediatric radiology. He testified he was very familiar with rickets, having seen it every year of his 35 years in practice. He said Noah did not have rickets; that his bones were normal radiographically. Asked whether his opinion was based on a reasonable degree of medical certainty, he responded, "Very much so." Dr. Cohen was also asked about the significant increase in Noah's head circumference. He explained that it was difficult to take accurate measurements in the immediate newborn period when there is molding of the head. If Noah's measurements were both accurate, it would be difficult to explain. However, he obtained Noah's height and weight as well and determined the subsequent measurement was proportionate. He testified the significant increase in Noah's head circumference

could be explained by an inaccurate measurement the first time or the overlapping sutures of Noah's skull molding and correcting themselves following his birth.

Dr. Cohen further testified that skull fractures are difficult to age but when he examined the head scan, there was a small amount of soft tissue swelling adjacent to the fracture. If there was a fracture at the time of birth, the soft tissue swelling would have resolved in several months. The presence of a small amount of soft tissue swelling indicated that the fracture was more likely a few weeks old rather than a few months old.

Dr. Gilgoff was called to testify again, this time by the agency, and questioned about the increase in Noah's head circumference. She could not explain the increase in Noah's head circumference except to say that he subsequently measured at the 98th percentile indicating that he had a large head. In addition, she would expect to see scalp swelling associated with a skull fracture, which was not reported at birth. She believed he sustained the skull fracture on January 5, 2015, because he was fussy, there was scalp swelling visible on the head scan, the family said it got bigger and there was bruising in that area. She testified she could not rule out a fracture at the time of birth but said that it was not consistent with a birth-related injury.

Dr. Gilgoff testified she would expect Noah to show signs of pain at the time of the femur fracture, explaining that a "broken bone is really, really, really painful." She would expect a baby to cry and be extremely upset and agitated. However, a baby cannot cry forever so at some point the baby would stop crying and try to decrease their motion to avoid pain. After seven to ten days, the bone creates a callus to help splint and protect the bone. Callus formation can be seen on X-rays. She did not see callus formation on the skeletal survey performed at Children's Hospital on January 30, 2015, but did see it on the repeat skeletal survey on February 17, 2015.

Dr. Gilgoff further testified that it would be hard for a person to detect that a baby had a fractured femur without knowledge that it existed. Such a person would recognize

that the baby was fussy or more irritable but could attribute it to colic, teething, or hunger.

Following Dr. Gilgoff's testimony, the parties stipulated to the admission of several exhibits in lieu of testimony. They included an e-mail from mother's therapist indicating mother understood the medical findings that Noah's injuries were nonaccidental and constituted child abuse but did not accept those findings. Additionally, an e-mail from father's therapist indicated that father continued to deny any part in abusing Noah and consistently stated that the doctors were wrong, based on conversations with "certain doctors."

Mother testified she saw a lump on the side of Noah's head when he was born but could not identify which side. She denied injuring his head or seeing anyone else injure it. On January 5, 2015, she took Noah to the doctor because the lump on the side of his head felt soft to her. She said the doctor told her there was bleeding underneath the scalp. On January 26, 2015, she left Noah with father and went shopping. While she was out, father called her and told her there was no more milk and Noah was fussy and she needed to hurry home. She could hear Noah crying but his cry sounded like his typical cry. When she got home, Noah was crying a lot and she assumed he was hungry so she fed him. His hair was wet and he smelled as if he had had a bath. Father told her he had given Noah a bath. She said Noah fell asleep when she grabbed him. When he woke up, she changed his diaper and he had a "big reaction." She thought he was reacting to the diaper rash. By January 30, 2015, Noah's rash was gone but he still cried when she changed his diaper. She was looking for other reasons to explain his crying and her mother pointed out there was something unusual when she changed his diaper. Mother did not see any swelling of his leg and was surprised to hear that he had a fracture. She said she did not notice anything wrong with Noah's leg between January 26, 2015, to January 30, 2015. However, she noticed Noah was fussy when she changed his diaper.

She said she was no longer involved with father and was not living with him. She said he had never been violent with her and she had never seen him treat Noah violently.

On cross-examination, mother testified that it was her father who first pointed out that there was something wrong with Noah's leg. She and her mother had gone to her father's house in Palo Alto on January 30, 2015, to celebrate her brother's birthday. Her father noticed that Noah was not moving his left leg. Her mother moved his leg to see how he reacted and that was when they decided to take him to the hospital. She further testified that she left Noah with father four or five times for 45 to 90 minutes but only returned to find him fussy on January 26, 2015. She had no explanation for Noah's fractured femur. When asked if she believed father caused it she said, "I don't know." She denied that he told her he caused the fractured femur or skull fracture or that she ever dropped Noah. She said she believed the femur fracture was from rickets and the skull fracture was caused by trauma at birth.

The juvenile court denied mother and father reunification services under section 361.5, subdivision (b)(5). The court noted it had already sustained the petition in which it found that Noah suffered from nonaccidental trauma. The court did not believe that Noah had rickets. Nor did the court believe that Noah sustained his skull fracture at birth. Rather, the court believed the testimony that even if Noah sustained a skull injury at birth, it would have resolved itself by the time he was seen on January 30, 2015, and January 31, 2015. As to the discrepancy in Noah's head circumference, the court believed there was an error in measurement, stating, "I'm hard-pressed to believe that there wasn't a mistake in medical records and mistakes certainly do happen." As to Noah's femur fracture, the court was concerned that mother did not notice anything unusual about Noah's leg from the January 26, 2015, to January 30, 2015, and that she had no intention of taking him to the emergency room until her father mentioned that something was wrong. The court concluded from that that she knew or should have

known that something was wrong well before January 30, 2015. Finally, the court was concerned that mother refused to accept that Noah's injuries were not an accident.

Mother filed a timely writ petition and her attorney appeared telephonically for oral argument.

DISCUSSION

Section 361.5, subdivision (b)(5) permits the denial of reunification services when the "child was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent." Thus, a denial under section 361.5, subdivision (b)(5) is predicated on a jurisdictional finding that the child is under the age of five and "has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child." (§ 300, subd. (e).) "Severe physical abuse" includes, as relevant here, "more than one act of physical abuse, each of which causes ... bone fracture." (*Ibid.*)

Here, mother agreed to the juvenile court's exercise of its jurisdiction over Noah under section 300, subdivision (e). By her agreement, the juvenile court found that Noah was severely physically abused in that he sustained a left femur fracture and a left parietal skull fracture inflicted nonaccidentally by mother or by someone known to mother and mother should have reasonably known that the person was physically abusing Noah. Thus, the section 300, subdivision (e) jurisdictional finding established a basis for denying mother reunification services under section 361.5, subdivision (b)(5), if there was clear and convincing evidence to support the subdivision (e) findings.

Mother contends the juvenile court erred in denying her reunification services under section 361.5, subdivision (b)(5) because there was insufficient evidence that she knew or reasonably should have known that Noah was being physically abused. She likens her case factually to *L.Z. v. Superior Court* (2010) 188 Cal.App.4th 1285 (*L.Z.*), a case in which the appellate court reversed the juvenile court's denial of services order

under section 361.5, subdivision (b)(5), and contends her case demands the same result. We concur.

L.Z. involved teenage parents whose two-month-old daughter sustained unexplained, nonaccidental fractures while in their care. The fractures included a spiral fracture of the baby's left humerus and nine fractured ribs. The mother was aware that the baby was in pain for about a week but her injuries were not discovered until the mother took her in for a regularly scheduled doctor's visit. After the examination was complete, the mother told the doctor she was concerned about the baby's arm. The doctor thought the arm looked fine but ordered X-rays, which revealed the various fractures. Once the baby's injuries were discovered, the mother expressed concern that the baby was injured by the father. Mother remembered a specific incident during which the father went into the baby's room and came out with her screaming. Afterward, the mother noticed the baby did not use her left arm as much as the right. When she asked the father about it, he denied knowing anything. On reflection, the mother thought the father hurt the baby on that occasion. She asked the father to admit injuring the baby, asked him to move out of their home and obtained a restraining order to keep him away. The juvenile court declined to order reunification services, relying in part on the failure of either parent to assume responsibility. (*L.Z.*, *supra*, 188 Cal.App.4th at pp. 1287-1291.)

On appeal, the mother in *L.Z.* argued the juvenile court erred in denying her reunification services because there was insufficient evidence she knew or reasonably should have known her baby was injured by abuse. The reviewing court agreed and reversed, noting that, as to the rib fractures, the parties stipulated that a person who had not caused the rib fractures would not know the injuries existed and would just see a "fussy, crying baby." As to the fractured arm, the court stated that, though the evidence demonstrated the mother was aware there was something wrong with the baby's arm, the child welfare agency had not proven that she knew it was caused by abuse." Thus, the

court concluded there was no direct evidence to support a finding the mother knew or should have known her baby was being abused. The court also concluded the evidence did not raise an inference that the mother should have known the cause of the baby's injuries. (*L.Z.*, *supra*, 188 Cal.App.4th at pp. 1292-1293.)

Mother contends the evidence was insufficient to prove her knowledge of physical abuse because, as occurred in *L.Z.*, a physician did not detect it. Further, there was medical expert opinion that a person who had not caused the femur fracture would not know it existed.

On a challenge to the juvenile court's denial of reunification services, we apply the substantial evidence standard. We do so bearing in mind that the juvenile court's decision must be supported by clear and convincing evidence. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) The heightened standard of clear and convincing proof is crucial and necessary to provide due process because a dispositional order denying a parent reunification services immediately sets the case on a fast track to termination of parental rights and adoption. (See *In re Dakota J.* (2015) 242 Cal.App.4th 619, 631.)

Here, there is no evidence that mother knew or should have known that Noah sustained a skull fracture. Dr. Gilgoff opined that Noah sustained the skull fracture on or around January 5, 2015. However, the doctor who examined Noah on that date reported that he appeared to be well and was not in any distress. Though he had a soft hematoma on the left parietal area, he was alert and moving all of his limbs. Further, there was nothing about Noah's presentation that concerned the doctor. The doctor did not order any diagnostic testing and instructed mother and father to monitor Noah and return if his symptoms worsened. As mother's appellate counsel aptly queried, "If the treating [doctor] could not diagnose the injury or abuse at the time of the January 5th examination, [how could mother have known?]"

Further, there *was* evidence that mother would *not* have known that Noah sustained the femur fracture. According to Dr. Gilgoff, a person who had not inflicted

the injury may only notice that the child was fussy and attribute the fussiness to normal discomfort caused by hunger, colic and teething.

Given there was insufficient evidence to show that mother knew or should have known that Noah was being physically abused, we conclude the juvenile court erred in denying mother reunification services under section 361.5, subdivision (b)(5), and grant the petition.

DISPOSITION

The petition for extraordinary writ is granted. Let an extraordinary writ issue directing respondent court to vacate its orders denying mother reunification services and setting the section 366.26 hearing. Respondent court is directed to conduct a new dispositional hearing and order reunification services for mother unless the court finds a basis for denying her services under section 361.5, subdivision (b). In all other respects, we affirm the juvenile court's dispositional findings and orders. This opinion is immediately final as to this court.